

**IN RE: UNCONTESTED  
APPLICATIONS OF ALCOA USA  
CORP. TO AMEND DRILLING AND  
OPERATING PERMIT NO. 0148 AND  
FOR A TRANSPORT PERMIT**

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**BEFORE THE  
POST OAK SAVANNAH  
GROUNDWATER CONSERVATION  
DISTRICT**

**ALCOA’S RESPONSE TO BLUE WATER 130’S REQUEST FOR PARTY STATUS**

TO THE POST OAK SAVANNAH GROUNDWATER CONSERVATION DISTRICT:

Applicant Alcoa USA Corp. (“Alcoa”) files this Response to the filing by Blue Water 130 Project, L.P. (“Blue Water 130”) entitled “Request by Blue Water 130 Project, L.P. for Party Status” (“Blue Water 130’s Filing”).

Before applicants, protestants and permit issuers debate about who should be considered an “affected party” or who has a justiciable interest in a proceeding about particular application, one critical step must occur – someone must timely request a contested case hearing. Here, no one has done so. And now, no one can do so timely. This uncomplicated fact makes Alcoa’s applications uncontested, ripe for consideration by the Board.

**I. THE APPLICATIONS ARE UNCONTESTED**

In its Filing, Blue Water 130 asks for three things: (1) that “the District hold a preliminary hearing on Alcoa’s Applications” (the Board of Directors of the District had already scheduled such a preliminary hearing before Blue Water 130 made its Filing); (2) that “Blue Water 130 be granted the right to appear and participate in such [preliminary] hearing”; and (3) that “the District determine Blue Water 130 to have party status to any contested case hearing.”

What Blue Water 130 did **not** do in its Filing, however, is request a contested case hearing. The words “Request a Contested Case Hearing” do not appear in the title of its Filing, and are not included in the body of the Filing. Further, Blue Water 130 failed to give the critical written Notice of Intent to Contest required under Rule 14.4.1.

This morning (Monday, July 26, 2021), Ross Cummings, President and General Partner of BlueWater Systems, confirmed to Tommy Hodges with Alcoa that Blue Water 130 did not intend to and in fact did not request a contested case hearing. Instead, Blue Water 130 took the often-used approach of requesting to be named a party if *anyone else* requested a contested case hearing.

Consistent with what Mr. Cummings told Mr. Hodges, the analysis of Blue Water 130's Filing set forth below under Section II shows that the Filing does not meet the basic requirements of a Notice of Intent to Contest under Rule 14.4.1. And even if Blue Water 130's Filing were found to meet those basic requirements, the analysis under Section III shows that the Filing would nevertheless fail as a Notice of Intent to Contest under Rule 14.4.1 because Blue Water 130 did not timely serve the Filing on Alcoa under Rule 14.4.1.

No one has properly or timely requested a contested case hearing on or given timely written Notice of Intent to Contest Alcoa's applications under Rule 14.4.1. Thus, Alcoa's applications are uncontested. That determination should be the first action by the Board at the preliminary hearing. As discussed under Section IV, it should be the only action taken by the Board before it closes the preliminary hearing. There is no reason to determine whether Blue Water 130 would qualify for party status in a contested case hearing that does not exist and that has not been requested. It would be inappropriate for the Board to do so.

Finally, as discussed under Section V, Blue Water 130's real reason for inserting itself into this uncontested process might be its stated interest in "assuring that the District's processing and potential grant of ALCOA's proposed drilling and operating permit amendment and transport application is nondiscriminatory *vis a vis* the District's regulatory treatment of Blue Water 130 and other District permittees." Alcoa has no objection if Blue Water 130 wants to assume the role of nondiscrimination monitor in this uncontested process and the Board decides to allow it.

## **II. BLUE WATER 130'S FILING FAILS TO GIVE NOTICE OF INTENT TO CONTEST ALCOA'S APPLICATIONS UNDER RULE 14.4.1**

Rule 14.4.1 provides as follows:

### **RULE 14.4. UNCONTESTED PERMIT HEARINGS PROCEDURES.**

1. Written Notice of Intent to Contest: Any affected person who intends to contest a permit application must provide timely written notice of that intent to the applicant and to the District. The notice to the District shall be to the district office located at 310 East Ave C, Milano, Texas 76556. Notice of intent to contest must be given at least five (5) business days prior to the date of the first hearing scheduled on the application. Such notice shall be given to both the applicant and to the District and shall be delivered at least five (5) business days prior to the date of the hearing. If the general manager intends to contest a permit application, the general manager must provide the applicant written notice of that intent not later than the later to occur of the following: the date of the last Board meeting that is held prior to the scheduled date of the hearing; or five (5) business days prior to the date of the hearing. If no notice of intent to contest is received at least five (5) business days prior to the hearing, the general manager, as instructed by the Board, will cancel the hearing and the Board will consider the permit at the next regular Board meeting. The fact that an application is uncontested does not obligate the Board to grant the permit or take any other specific action that is not found appropriate by the Board. [Amended June 12, 2012] [Amended July 12, 2016]

For the following reasons, Blue Water 130's Filing does not meet the requirements of a Notice of Intent to Contest Alcoa's applications under Rule 14.4.1:

- (1) The Filing fails to include the simple statement that "Blue Water 130 intends to contest Alcoa's applications." The first sentence of the rule makes it clear that, to be considered a request for contested case hearing, the intent to contest must exist and be declared at the time the Filing is made: "Any affected person who intends to contest a permit application must provide timely written notice of that intent to the applicant and to the District." Instead, Blue Water 130 states just the opposite. In the second sentence under Section I of its Filing, Blue Water 130 states that it doesn't know what its position is at the time of filing. At the end of Section I, Blue Water 130 by inference describes itself as a "potential" protestant: "Based on the foregoing, Blue Water 130 has unique justiciable interests not common to the public that will not, and cannot, be adequately represented by any other potential protestant." Blue Water 130 makes it clear in its Filing that it did not have a present intent to contest Alcoa's Applications at the time it made its Filing.<sup>1</sup>
- (2) The Filing makes it clear that it is *not* made under Rule 14.4.1. At the very beginning of the Filing, Blue Water 130 states that the Filing is made pursuant to Rules 7.5.3, 8.3.3 and 14.2.4, none of which deal with what a third party must do

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<sup>1</sup> The Filing jumps from Section I to Section III, so perhaps a prior draft contained a Section II that said something different and Blue Water 130 rejected that version.

to trigger a contested case hearing. There is no mention of Rule 14.4.1, which deals exclusively with what must be done to trigger a contested case hearing, and there also is no mention of Rule 14.5.3, which lays out certain information that must be included in a request for contested case hearing. The absence of any reference to Rules 14.4.1 and 14.5.3 is consistent with everything that is contained (and not contained) in the Filing: The Filing deals exclusively with requesting party status “in any contested case hearing” on the applications, but makes no independent request for a contested case hearing; it fails to include the critical Notice of Intent to Contest required by Rule 14.4.1; and it fails to address much of the information required by Rule 14.5.3.

- (3) Blue Water 130’s Filing requests party status in any contested case that may be held on Alcoa’s applications, but it does not independently request that a contested case be held. That type of request is not uncommon: a third party may not be opposed to what an applicant is requesting yet interested enough to ask to be a party if someone else triggers a contested case hearing. In any event, regardless of what Blue Water 130 now says its intent was, its Filing cannot independently trigger a contested case. Contested cases can be extremely costly and time consuming and persons desiring to trigger them must be held to strict standards. Blue Water 130’s Filing does not meet the standards required to trigger a contested case.

### **III. BLUE WATER 130’S FILING ALSO FAILS AS A NOTICE OF INTENT TO CONTEST UNDER RULE 14.4.1 BECAUSE BLUE WATER 130 DID NOT TIMELY SERVE THE FILING ON ALCOA UNDER RULE 14.4.1**

The District rules that spell out what is required service for a written request for party status (Rules 7.5.3 and 14.2.4) state that any person that wishes to be heard as a potential party to a hearing must serve the filing on the General Manager but there is no requirement to serve it on the applicant. Blue Water 130 nevertheless sent a copy of its Filing to Alcoa, but only by mail. The postmark on the envelope shows that it was mailed on Tuesday, July 20, 2021. Alcoa received the mailing on Saturday, July 24.

In contrast, the District rule that spells out what is required for service of a written notice of intent to contest an application (Rule 14.4.1, quoted in its entirety above) states that a person who intends to contest the application must give timely written notice to **both** the applicant and the District and the notice “shall be delivered at least five (5) business days prior to the date of the hearing.” A later sentence states that “[i]f no notice of intent to contest is received at least five (5)

business days prior to the hearing, the general manager, as instructed by the Board, will cancel the hearing and the Board will consider the permit at the next regular Board meeting.” To be consistent with this later sentence, the word “delivered” – where it is used earlier in the rule to clearly apply to both the applicant and the District – must mean *actually* delivered (and not simply deposited in the mail), so the Notice of Intent to Contest must be received by both the applicant and the District at least 5 business days prior to the date of the hearing.

As discussed above, Blue Water 130’s mailed-only Filing to Alcoa was received by Alcoa on July 25, 2021, just 1 business day prior to the date of the hearing. Blue Water 130’s Filing also fails as a Notice of Intent to Contest under Rule 14.4.1 because Blue Water 130 did not timely serve the Filing on Alcoa under Rule 14.4.1.

#### **IV. THE BOARD SHOULD DISREGARD AND NOT CONSIDER BLUE WATER 130’S REQUEST THAT “THE DISTRICT DETERMINE BLUE WATER 130 TO HAVE PARTY STATUS TO ANY CONTESTED CASE HEARING”**

Blue Water 130 filed a speculative request to be named a party to a contested case hearing that does not exist and has not been requested. It is the only person to file such a request. Given that the Applications are uncontested (i.e., there will be no contested case hearing), it is inappropriate for the Board to hypothetically determine whether Blue Water 130 would have party status if the applications were contested. The Board should simply close the preliminary hearing after determining and declaring that the applications are uncontested.<sup>2</sup>

#### **V. BLUE WATER 130 HAS NOT ARTICULATED ANY JUSTICIABLE INTEREST IN ALCOA’S APPLICATIONS**

Alcoa wants to make it clear that it believes Blue Water 130 has pleaded no justiciable

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<sup>2</sup> If, for whatever reason, the Board decides it wants to hear Blue Water 130’s Request for Party Status, Alcoa of course will first need discovery against Blue Water 130 to properly prepare for the process.

interest in Alcoa's applications and, if the applications were contested, it would not be entitled to be named a party to any contested case hearing on any possible contested issue within the jurisdiction of the District. Nothing in its Filing qualifies as the required "evidence establishing its standing as an affected person" under Rule 14.2.4, or that "establishes in writing a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority and that is affected by the permit or the permit amendment application scheduled for hearing" under Rule 7.5.3. There cannot be any such evidence. Alcoa already holds the operating permit at issue and is not requesting any change that could affect any legitimate interest of Blue Water 130. Alcoa is not requesting any increase in the aggregate annual production. Nor is it requesting any change in location or production rate of any authorized well. Nor is it requesting any additional wells. Blue Water 130's vague references to its "extensive groundwater lease and permit rights" and its "thousands of acres" of groundwater rights are meaningless, as is the vague, jumbled claim that the permits it holds "confer an economic interest in Blue Water 130 because this underlying groundwater rights and permits and supporting transportation system is the product of substantive economic investment over many years, resulting in investment-backed expectations that could potentially be adversely affected by the District's actions on the ALCOA Applications." But finally, near the end of Section 1, Blue Water hints at what its real interest may be: "Blue Water 130's interests include assuring that the District's processing and potential grant of ALCOA's proposed drilling and operating permit amendment and transport application is nondiscriminatory *vis a vis* the District's regulatory treatment of Blue Water 130 and other District permittees." This interest is as far from a justiciable interest in Alcoa's applications as there could be.

## VI. PRAYER

Alcoa requests that the Board at the preliminary hearing determine and declare that Alcoa's applications are uncontested. Alcoa further requests that the Board close the preliminary hearing after making that determination and declaration.

Respectfully submitted,

By: 

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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent via email on July 26 2021 to each of the following:

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Roger Nevola